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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1164

DEBORAH A. NORTHCROSS, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	9
Appendix	1a

Table of Authorities

Cases:

Brown v. Board of Education, 347 U.S. 483 (1954) 7, 8

Clark v. Board of Education of Little Rock School District, 449 F.2d 493 (8th Cir. 1971), 369 F.2d 661 (8th Cir. 1966) 8

Cooper v. Allen, —— F.2d —— (5th Cir. 1972) 8

Ford v. White, —— F. Supp. —— (S.D. Miss. 1972) 8

Johnson v. Coombs, —— F.2d —— (5th Cir. 1972) 6

Knight v. Auciello, —— F.2d —— (1st Cir. 1972) 8

La Raza Unida v. Volpe, — —F. Supp. —— (N.D. Cal. 1972) 8

PAGE

Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) 8

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 8

N.A.A.C.P. v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972) 8

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 6

Ross v. Goshi, —— F. Supp. —— (D. Hawaii 1972) 8

Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972) 8

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 3

Thompson v. School Board of Newport News, —— F.2d —— (4th Cir. 1972) 6

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 8

Wyatt v. Stickney, —— F. Supp. —— (M.D. Ala. 1972) 8

Other Authorities:

28 U.S.C. § 1254 2

42 U.S.C. § 1983 8

Federal Rules of Appellate Procedure 39 ..... 4, 8

Section 718, Emergency School Aid Act of 1972 ..... 2, 5, 6, 7, 8

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PETITION FOR WRIT OF CERTIORARI

The petitioners Deborah Northcross *et al.* respectfully pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 24, 1972.

Opinion Below

The Court of Appeals issued no opinion in support of its order of November 24, 1972. That order appears in the Appendix hereto.

The Court of Appeals issued opinions at earlier stages in this proceeding on June 7, 1971, which is reported at

444 F.2d 1179, and on August 29, 1972, which is reproduced in the Appendix to the Petition for a Writ of Certiorari filed in No. 72-677. The District Court for the Western District of Tennessee issued opinions at earlier stages in this proceeding on May 1, 1970, reported at 312 F. Supp. 1150, and on December 10, 1971 and April 20, 1972, both reproduced in the Appendix to the Petition for a Writ of Certiorari filed in No. 72-677.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 24, 1972. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals err in denying plaintiffs costs and attorneys fees?

Statutory Provisions Involved

Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, provides:

> SEC. 718. Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and sec-

ondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Statement of the Case

This case was commenced over a decade ago to desegregate the public schools of Memphis. The latest round of litigation derives from the decision of the Sixth Circuit Court of Appeals in 1971 directing the District Court to reconsider the desegregation plans for the Memphis public schools in the light of this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

In April, 1972, after extensive hearings, the District Court ordered into effect a new desegregation plan to eliminate the vestiges of the dual school system in Memphis. Both plaintiffs and defendants appealed from the order of the District Court. On August 29, 1972 the Sixth Circuit ruled in favor of the plaintiffs on all questions, granting plaintiffs' request for an order directing the District Court to prepare a timetable for further desegregation, and affirming over defendants' objections the District Court's order for the 1972-1973 school year. On February 20, 1973, this Court denied the school board's petition for a writ of certiorari to review the decision of August 29, 1972. *Board of Education of Memphis City Schools* v. *Northcross*, No. 72-677.

Plaintiffs' complaint, filed on March 31, 1960, expressly sought costs as part of the relief prayed for. On September 7, 1972, plaintiffs filed a timely Bill of Costs in

connection with the August 29 decision, pursuant to Federal Rule of Appellate Procedure 39(c). On October 25, 1972, counsel for plaintiffs were first notified by the Clerk of the Sixth Circuit that the court had directed that costs not be taxed in favor of plaintiffs.[1] On November 3, 1972, plaintiffs petitioned the Sixth Circuit for rehearing, and urged that the judgment and mandate of the court be amended to award plaintiffs their costs, including a reasonable attorneys fee as part thereof.[2] On November 24, 1972, the Court of Appeals denied the petition for rehearing and separately and expressly denied plaintiffs' requests for costs and attorneys fees.

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[1] The majority opinion of the panel issued August 29, 1972, contains no reference to the matter of costs. The words "no costs allowed" appeared at the end of the *dissenting* opinion and were not separately paragraphed. The transmittal letter of the Clerk of the Sixth Circuit, dated August 29, 1972, contained no mention of costs. The mandate of the Sixth Circuit, issued October 5, 1972, was not furnished to counsel for the parties. On October 13, 1972, plaintiffs' counsel wrote to the clerk of the Sixth Circuit inquiring as to the disposition with respect to costs. On October 25, 1972, counsel for plaintiffs received a letter from the clerk stating that, "at the direction of the court," no costs had been taxed in the mandate of October 5. Whether the clerk found this direction in the August 29 opinion or received it at some later time was not disclosed.

[2] Because of the delay in notification the petition was accompanied by a motion for leave to file petition out of time. Defendants opposed the petition for rehearing on the merits thereof but did not question its timeliness.

REASONS FOR GRANTING THE WRIT

This is the first case to reach this Court arising under section 718 of the Emergency School Aid Act of 1972. Section 718 expressly authorizes the federal courts to award a reasonable attorney's fee as part of costs to the prevailing party in school desegregation cases. The statute provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 718 became law on July 1, 1972.

In their petition for rehearing in the Court of Appeals seeking costs including a reasonable attorney's fee, petitioners explicitly called the court's attention to section 718. Petitioners urged that the section clearly applied to the instant case, and that under the facts an award of legal fees was mandatory. The Sixth Circuit denied both costs and legal fees without opinion.

The decision reached by the Sixth Circuit in this case is at odds with contemporaneous decisions handed down in

Section 718 cases by the Fourth and Fifth Circuit Courts of Appeals. The opinions of those courts in *Johnson* v. *Coombs* and *Thompson* v. *School Board of Newport News* are reproduced in the Appendix hereto.

Both the Fourth and Fifth Circuits would require the award of attorney's fees for services rendered after the effective date of the Act, regardless of when the action involved was commenced. *Johnson* v. *Coombs*, p. 2a; *Thompson* v. *School Board of Newport News*, p. 6a. In this case substantial services were rendered after the enactment of the statute on July 1, 1972; the appeal itself was argued on July 16, 1972.

While section 718 states that the federal courts "may" award attorney's fees under the circumstances described, the Fifth Circuit correctly construed the statute to require the award of such fees in the absence of special circumstances rendering such an award unjust. In *Johnson* the court, noting the similarity of language and purpose between section 718 and Title II of the 1964 Civil Rights Act, explicitly adopted this Court's standard announced in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), p. 9a. In the instant case the Sixth Circuit did not find any circumstances rendering the award of attorney's fees unjust, and none exist.

The result reached by the Sixth Circuit in this case is entirely inconsistent with that reached by the Fifth Circuit in *Johnson* under virtually identical circumstances. Here, as in *Johnson*, legal fees were sought, *inter alia*, for services rendered in prosecuting an appeal after the effective date of the Act in an action commenced before that date. Here, as in *Johnson*, there were no special circumstances found, shown, or even argued which would have made an award unjust. Here, as in *Johnson*, the plaintiffs had succeeded in compelling the defendant school board

to abolish a de jure dual school system. Yet here, unlike *Johnson*, attorneys' fees were denied.

The Sixth Circuit's failure to explain its denial of costs and attorney's fees obscures the exact nature of its disagreement with the interpretation of section 718 adopted by the Fourth and Fifth Circuits. But the rule adopted in this case, however unclear its rationale, is of course binding upon the district courts in the Sixth Circuit. Conflicts between the circuits regarding a plaintiff's rights to attorney's fees in school desegregation cases should not be countenanced merely because one of the appellate courts involved declines to enunciate the basis of its decisions.

It is particularly important that this Court clarify the meaning of section 718 because of its impact on private parties seeking to enforce the commands of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and its progeny. Since this Court's decision in *Brown*, Negro school children and their parents have been responsible for the bulk of the school desegregation litigation in the United States. That litigation has often proved lengthy and complicated; the instant plaintiffs have been pursuing this case in the Federal courts for 13 years. Yet while the public officials opposing them were able to draw upon tax dollars to fight the integration of the public schools, private citizens have all too often been forced to bear their own expenses. It was to end this obvious injustice that Congress enacted section 718, and a writ of certiorari is necessary to assure that Congress' desires are not frustrated in the Sixth Circuit.

The result reached by the Sixth Circuit in this case is inconsistent with a number of decisions in other circuits awarding attorney's fees to plaintiffs suing to enforce important congressional or constitutional policies even in the absence of an express statutory authorization of such fees. *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143

(5th Cir. 1971); *Knight* v. *Auciello*, —— F.2d —— (1st Cir. 1972); *N.A.A.C.P.* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972); *Cooper* v. *Allen*, —— F.2d —— (5th Cir. 1972); *Wyatt* v. *Stickney*, —— F. Supp. —— (M.D. Ala. 1972); *Ford* v. *White*, —— F. Supp. —— (S.D. Miss. 1972); *La Raza Unida* v. *Volpe*, —— F. Supp. —— (N.D. Cal. 1972); *Ross* v. *Goshi*, —— F. Supp. —— (D. Hawaii 1972). Litigation such as this benefits all students, black and white, and imposing plaintiff's legal fees on the defendant school board effectively transfers that expense to the entire class benefiting from it. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). After almost two decades of litigation under *Brown*, full relief under 42 U.S.C. § 1983 requires that the victims of discrimination no longer be forced to bear the constant and crushing burden of enforcing their constitutionally accorded rights. *Clark* v. *Board of Education of Little Rock School District*, 449 F.2d 493 (8th Cir. 1971), 369 F.2d 661 (8th Cir. 1966). Petitioners submit that the award of legal fees under section 718 should not be limited to fees for services rendered after July 1, 1972, but should extend to all cases still pending on that date. *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969). Certainly in a case such as this the Court of Appeals was unjustified in denying to plaintiffs as the prevailing party on appeal the costs authorized by Rule 39, Federal Rules of Appellate Procedure.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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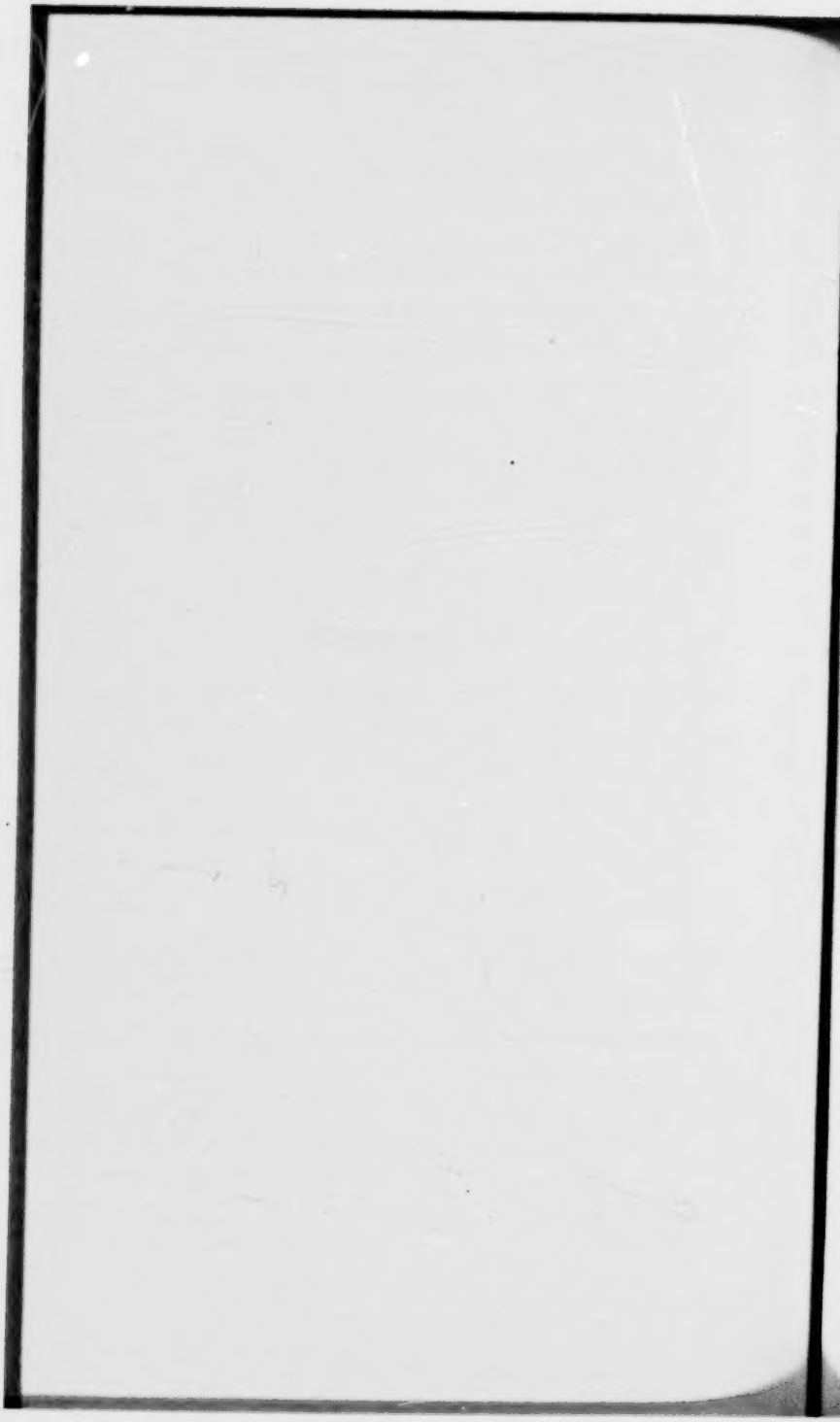
APPENDIX



APPENDIX

Order

In the
United States Court of Appeals
For the Sixth Circuit
(Filed November 24, 1972)

Deborah A. Northcross, *et al.*,

Plaintiffs-Appellees-Cross Appellants,

—v.—

Board of Education of the Memphis City Schools, *et al.*,

Defendants-Appellants-Cross Appellees.

Before:

Weick, Celebrezze and Peck,
Circuit Judges.

Upon due consideration, Plaintiffs-Appellees and Cross-Appellants' motion to file petition for rehearing and suggestion for rehearing en banc out of time is hereby denied.

Plaintiffs-Appellees' request for costs and attorneys' fees is hereby denied.

So ordered.

Entered by Order of the Court

James A. Higgins
Clerk

Appendix

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 71-2032 and 71-2033

FRANK V. THOMPSON, *et al.*,

Appellants,

v.

SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, *et al.*,

Appellees.

Nos. 71-1993 and 71-1994

MICHAEL COPELAND, *et al.*,

Appellants,

v.

SCHOOL BOARD OF THE CITY OF PORTSMOUTH, *et al.*,

Appellees.

No. 72-1065

NATHANIEL JAMES, *et al.*,

Appellees,

v.

BEAUFORT COUNTY BOARD OF EDUCATION,

Appellant.

(Decided November 29, 1972)

Appendix

Before

HAYNSWORTH, *Chief Judge*,
WINTER, CRAVEN, BUTZNER, RUSSELL and FIELD,
Circuit Judges, sitting en banc.

PER CURIAM:

We ordered *en banc* consideration of lawyer fee claims in these school cases to consider the extent of the applicability of § 718 of the Emergency School Aid Act of 1972. In the City of Portsmouth and the Beaufort County cases, however, apparently adequate fees are allowable on other bases. The precise extent of the reach of § 718 in those cases, therefore, now appears academic.

In the Newport News case, most of the legal services are yet to be rendered, and we are unanimously of the view that, if relief is granted, fees will be allowable under § 718 for those future services. The division within the Court as to the application of § 718 will have some bearing upon any ultimate allowance of fees in that case, though less than was supposed when reargument was requested.

The Court is unanimously of the view that it should apply § 718 to any case pending before it after the Section's enactment. This is consistent with the principle of *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, most recently enunciated in the Supreme Court in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268.

A majority of the Court, however, is of the view that only legal services rendered after the effective date of § 718 are compensable under it. Those members of the Court invoke the principle that legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute applied in that manner. They do not find such an intention

from the omission of a provision in an earlier draft expressly limiting its application to services rendered after its enactment, when the earlier draft was extensively revised and there is no affirmative expression by any member of Congress of an intention that it should be applied to services rendered prior to its enactment.

A minority of the Court would apply § 718 to legal services, whenever rendered, in connection with school litigation culminating in an order entered after June 30, 1972. In their view, someone must pay the fee, and a statutory placement of the burden of payment on school boards is not a retroactive application of the statute, though some of the services may have been rendered before its enactment as long as an order awarding relief, the fruit of the services, is entered afterwards.

The cases will be remanded for such further proceedings in the District Court as may be necessary in accordance with the views of the majority, applying § 718, when it may otherwise be applicable, only to services rendered after June 30, 1972.*

In the *Portsmouth* case, the District Court will award reasonable attorneys' fees on the principle of *Brewer* v. *The School Board of the City of Norfolk*, 4 Cir., 456 F.2d 943 (1972). In the *Beaufort County* case, the award heretofore made by the District Court is approved.

Remanded.

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* In the *Newport News* case, on a completely different basis, the District Court made an award of attorneys' fees of $750.00 in connection with services and events occurring before June 30, 1972. Since that award was not dependent upon § 718, nothing we say here should be construed to disturb it.

WINTER, *Circuit Judge*, concurring specially:

I concur in the judgment of the court to the extent that it directs the allowance of attorneys fees in the *City of Portsmouth*, *Beaufort County* and *Newport News* cases. For the reasons set forth in my separate opinion in Bradley v. School Board of Richmond, —— F.2d —— (4 Cir., No. 71-1774, decided), I would direct the allowance in all three cases on the basis that § 718 of the Emergency School Aid Act of 1972 applies to legal services rendered before the effective date of that enactment in cases pending on that date.

Appendix

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3030

PRINCESS RANOLA JOHNSON, ETC., ET AL.,

Plaintiffs-Appellees,

versus

M. BROWNING COMBS, Superintendent,
Grand Prairie Independent School District, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(December 6, 1972)

Before THORNBERRY, MORGAN and CLARK,
Circuit Judges.

CLARK, Circuit Judge: On the merits, the judgment appealed from is due to be affirmed. *Weaver* v. *Board of Public Education of Brevard County, Florida*, —— F.2d —— (5th Cir. 1972) [No. 71-3465, September 6, 1972].

The collateral question as to plaintiffs' entitlement to attorneys' fees below and on this appeal raises a novel issue. The law of the circuit prior to the passage of Sec-

tion 718 of the Education Amendments Act of 1972[1] made it clear that in school desegregation cases attorneys' fees would be awarded only if the school board was found to have acted in an "unreasonable and obdurately obstinate" manner. *See Williams* v. *Kimbrough*, 415 F.2d 874 (5th Cir. 1969), *cert. denied* 396 U.S. 1061, 90 S.Ct. 753, 24 L.Ed.2d 755 (1970) [citing *Kemp* v. *Beasley*, 352 F.2d 14 (8th Cir. 1965)], and *Horton* v. *Lawrence County Board of Education*, 449 F.2d 793 (5th Cir. 1971). The same rule has been applied in actions under 42 U.S.C.A. § 1982 (which, like *Williams and Horton*, were not governed by a statutory provision for attorneys' fees), *Lee* v. *Southern Homesites Corporation*, 429 F.2d 290 (5th Cir. 1969).

However, the enactment of Section 718 of the Education Amendments Act of 1972 requires that we answer three questions on this appeal: first, does the statute merely codify the existing "unreasonable and obdurately obstinate" standard, or does it set new parameters within which the district court must exercise its discretion; second, if the statute does create a new legal standard, to what degree should that standard be applied retroactively; and third, when is an order a "final order" within the meaning of the statute?

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[1] Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

Appendix

We note at the outset that Section 718 is similar, though not identical,[2] to the provision allowing attorneys' fees to the successful party in an action based on Title II of the 1964 Civil Rights Act.[3] In the leading case interpreting that provision, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968), the Supreme Court held that attorneys' fees must be awarded "unless special circumstances would render such an award unjust." Rejecting "good faith" as a defense, the Court reasoned that,

> If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice, 1352 (1966 ed.).

390 U.S. at 403 *n.* 4, 88 S.Ct. at 966 *n.* 4.

Newman has been applied by this Court in *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), where we concluded in another Title II action that neither the fact that a non-frivolous controversy existed nor the fact that the defendants acted in good faith con-

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[2] Section 718 requires a threshold finding by the trial court that the proceedings were necessary to enforce compliance.

[3] In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs, and the United States shall be liable for costs the same as a private person, 42 U.S.C. § 2000a-3(b).

stituted the "special circumstances" contemplated by the Supreme Court. Thus, the standard applied under the statutory language in Title II actions diverged somewhat from the standard applied in school desegregation cases by this Court and other Circuit Courts which have considered the question. *See Brewer* v. *School Board of City of Norfolk, Virginia*, 456 F.2d 943, 949 (4th Cir.), *cert. denied* —— U.S. ——, 92 S.Ct. 1778, —— L.Ed.2d —— (1972). That Congress chose to structure Section 718 in language similar to that interpreted by the Supreme Court in *Newman* is a strong factor indicating that the two statutes should be interpreted *pari passu*.

Moreover, in addition to the similarity of the language used in Section 718 and its Title II analogue, the two provisions share a common *raison d'etre*. The plaintiffs in school cases are "private attorneys general" vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose—"to encourage individuals injured by racial discrimination to seek judicial relief . . ." *See Newman, supra*, 390 U.S. at 402, 88 S.Ct. at 966. We hold that if the court finds that the proceedings were necessary to bring about compliance, then Section 718 must be applied in accordance with the test enunciated in *Newman, i.e.*, in the absence of special circumstances attorneys' fees are to be awarded.

We decline to apply § 718 retroactively to the expenses incurred during the years of litigation prior to its enactment. This interpretation of the neutral language of the statute is compelled both by the long-established presumption against retrospective application in the absence of a clear legislative intent and the clear precedents of this Circuit governing such litigation. School desegregation

litigation has produced precedents which have been somewhat less than clear and explicit. Even when plaintiff and defendant were in agreement about the end to be reached, the means and the timing which would accomplish the goal often remained in bitter dispute. There was a necessity that the demands of the aggrieved plaintiffs be harmonized with legitimate educational interests of the school authorities and the community as a whole in the smooth and uneventful transition to a unitary school system. Many school districts have been litigating in this field filled with fast changing precedents and guidelines for a number of years; to apply this statute retroactively would place a wholly unexpected and unwarranted burden on these districts who have done no more than litigate what they, in good faith, believed to be demands which exceeded the Constitution's demand.[4]

Under these circumstances, a retroactive application of this statute would punish school boards for good faith action in seeking the guidance of the courts to determine what was required of them. Furthermore, retroactive awards of attorneys' fees for these past years of litigation would not serve the purpose of encouraging future legal challenges of segregated school systems. The inconclusive legislative history of Section 718 furnishes no basis for inferring that Congress intended this provision to be given such a sweeping effect.

Thus, as to legal services awarded prior to July 1, 1972, the effective date of the Education Amendments Act of 1972, we hold that the award of attorneys' fees is to be

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[4] Of course if the litigation could be characterized as unreasonable and obdurately obstinate, then by the same reasoning as advanced in *Newman, supra*, Section 718 would be surplusage under the existing rule of *Williams* and *Horton*.

governed by the standard enunciated by this court in *Williams* and *Horton*. Awards for legal services rendered on or after that date are governed by the statute.

The brief order of the trial court indicates that the single standard applied there was the one set out in *Bradley* v. *School Board of City of Richmond, Virginia*, 53 F.R.D. 28 (E.D. Va. 1971). Without deciding whether the standard enunciated in *Bradley* is consistent with Section 718, we rule that *Bradley*, at least insofar as it holds that full and appropriate relief in school desegregation cases must include the award of expenses of litigation, 53 F.R.D. at 41, is inconsistent with the standard of this circuit applicable to legal services rendered prior to the effective date of the statute. Since the record indicates that some part of the legal services in this case may have been rendered prior to that date, we vacate the award of attorneys' fees and remand to the district court for further proceedings in accord herewith.

Section 718 expressly allows attorneys' fee awards only upon "the entry of a final order." The most suitable test for such finality exists in the body of law which has been developed in determining appealability under 28 U.S.C.A. § 1291. In general, this means a judgment or order which ends the litigation on the merits and comprehends only the execution of the court's decree. *See C. Wright, Federal Courts* § 101 (2d ed. 1970). Since most school cases involve relief of an injunctive nature which must prove its efficacy over a period of time, it is obvious that many significant and appealable decrees will occur in the course of litigation which should not qualify as final in the sense of determining the issues in controversy. The ultimate approach to finality must be an individual and pragmatic one. Such a matter should be committed to the determination of the trial court.

For the district court's guidance at the appropriate time, we now hold that plaintiffs are entitled to a reasonable attorneys' fee for prosecuting this present appeal, in the amount of 1,250 dollars. *See Meeks* v. *State Farm Mut. Ins. Co.*, —— F. 2d —— (5th Cir. 1972) [No. 71-2137, No. 2293, May 22, 1972]; *Campbell* v. *Green*, 112 F.2d 143 (5th Cir. 1940).

AFFIRMED in part,
VACATED in part and
REMANDED.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1164

DEBORAH A. NORTHCROSS, et al.
Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

Statement of the Case 2
Reasons for Denying the Writ 3
Conclusion 5

TABLE OF CASES

Merrill v. *Builders Ornamental Iron Company*, 197 F. 2d 16 (10th Cir., 1952) 3

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1164

DEBORAH A. NORTHCROSS, et al.,
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vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Come the respondents and respectfully submit to the Court that the petition for certiorari heretofore filed by the petitioners-plaintiffs in this cause should be denied. *The leading question presented*—Did the Court of Appeals err in requiring that each party bear its own costs and attorneys' fees on appeal and in denying the request of petitioners for out-of-time consideration of their petition for rehearing and suggestion for rehearing *en banc*?

STATEMENT OF THE CASE

The petition for certiorari in this case grew out of proceedings for the adoption of a revised plan of desegregation for the Memphis City School System. In a hearing before the District Court, the petitioners-plaintiffs proposed the adoption of a plan of desegregation which was drafted by their expert witness and which was subsequently rejected by the District Court. Respondents opposed the implementation of a plan of desegregation based on the creation of a transportation system. The District Court adopted a plan of desegregation based on less extensive transportation than the plaintiffs sought but requiring the transportation of a projected 14,000 students and suggesting that additional transportation could be implemented at a later date. The decision of the District Court was appealed by both parties. On June 2, 1972, the Court of Appeals granted respondents' motion for a stay of the District Court order. This stay remained in effect until August 29, 1972, when a decision on the merits was reached by the Court of Appeals.

The PETITIONERS modified their position on appeal to recognize the fact that, after the granting of the stay order, a more drastic plan of desegregation could not be implemented by the start of the 1972-1973 school year. The principal effect of the Sixth Circuit Opinion, however, was to uphold the original decision of the District Court as against the previous positions of both the petitioners and the respondents, with the added proviso that a definite schedule for the implementation of a further plan should be adopted. Although the majority Opinion of the Court of Appeals did not expressly discuss the issue of costs and attorneys' fees, it appears that the Court would have denied such costs pursuant to its discretion under Rule 39(a) of the Rules of Appellate Procedure on the theory that there was

no clearly prevailing party on the two appeals and that each party should be allowed to bear its own costs. See *Merrill* v. *Builders Ornamental Iron Company*, 197 F. 2d 16 (10th Cir., 1952).

Following the petitioners' out-of-time application for rehearing and suggestion for rehearing *en banc*, the Court of Appeals acted on November 24, 1972, to deny this motion. No discussion of reasons for the denial was given.

REASONS FOR DENYING THE WRIT

Respondents submit that the writ of certiorari should be denied for two basic reasons. First, the record does not support the contention of the petitioners that the Court of Appeals abused its discretion in denying costs and attorneys' fees. Second, the action which petitioners seek to review was taken pursuant to a motion which was admittedly filed out of time with the Court of Appeals and the record is unclear as to what part of the failure of petitioners to file their motion on time affected the outcome in the Court of Appeals.

The statute on which petitioners rely deals with the discretionary power of the Court to award attorneys' fees to an action for school desegregation based on the Civil Rights Act of 1964 or on the Fourteenth Amendment of the Constitution of the United States. The statute is permissive in its language, providing that such an award may be made where ". . . the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Section 718, Emergency School Aid Act of 1972. Not only is this statute couched in permissive terms but it also requires a finding as to the necessity of the proceedings. No such finding has been requested of the Court

of Appeals and, accordingly, no opportunity has been afforded the respondents to present evidence with regard to the reasons for denying an award for attorneys' fees.

It should also be noted that the action of the Court of Appeals not only involves the statute but involves the discretion of the Court of Appeals under Rule 39a, Federal Rules of Appellate Procedure, to control the entire question of taxing the costs of cases on its own docket. There is no basis for presuming that Congress intended that the section quoted, involving the appropriateness of including attorneys' fees as a particular item of court costs, was also intended to have the effect of impinging on the discretion of courts of appeals with respect to their overall decisions in allocating costs. This case did not result in the implementation of the plan which was presented and proposed by the plaintiffs in the District Court. In fact, it left the entire matter of an appropriate final plan of desegregation in the lap of the District Court where it had resided prior to this appeal. Under these circumstances, the provisions of Section 718 dealing with items properly includable in a cost bill are irrelevant to the overall question of the power of the Court of Appeals to exercise its discretion as to the allocation of costs.

Respondents further submit that a grant of certiorari on the basis of the present record would prove awkward and improvident in light of the uncertainty surrounding petitioners' out-of-time filing of their motion before the Court of Appeals. It will be impossible to say to what extent the action of the Court of Appeals was based on the fact that no timely motion for an amendment of the Court's order was made by the petitioners and, under these circumstances, the further consideration of this matter by writ of certiorari will prove difficult and uncertain.

CONCLUSION

For the reasons given above, respondents submit that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1164

DEBORAH A. NORTHCROSS, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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Table of Authorities

	PAGE
California v. Krivda, 409 U.S. 33 (1972)	3n
Johnson v. Coombs, —— F.2d —— (5th Cir., 1972)	1, 2
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968)	1, 2
Newman v. Piggie Park Enterprises, 377 F.2d 433 (4th Cir. 1967)	2n
Taylor v. McKeithen, 407 U.S. 191 (1972)	3n
Section 718, Emergency School Aid Act of 1972	1
Federal Rules of Appellate Procedure, Rule 39	2, 3

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REPLY BRIEF

Respondents urge that the denial of costs, including legal fees, was proper in this case because Section 718 of the Emergency School Aid Act is "couched in permissive terms" and the Sixth Circuit's action did not constitute an abuse of "its discretion." Brief in Opposition, p. 3. Petitioners agree that the Sixth Circuit's denial of such costs and fees was undoubtedly based on such an interpretation of § 718. This interpretation of § 718, urged by Respondent and apparently relied on by the Sixth Circuit Court of Appeals, has been expressly rejected by the Fifth Circuit Court of Appeals in *Johnson* v. *Combs*, Petition for Writ of Certiorari, pp. 6a-12a. *Johnson* concluded, as had this Court, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that the statute did not put the question of costs and fees within the broad discretion of the courts,

but made such awards mandatory in the absence of special circumstances.[1] It is this inconsistency between the instant case, on the one hand, and *Johnson* and *Newman* on the other, which requires the granting of the Writ in this case.

Respondents maintain, second, that denial of costs and fees was proper because plaintiffs had not prevailed on appeal, as required by Rule 39, Federal Rules of Appellate Procedure. Brief in Opposition, pp. 2-3. The Sixth Circuit, however, clearly believed it had given plaintiffs all the relief they sought on appeal:

> "[Plaintiffs] request only that this Court direct the District Court to prepare a timetable for further desegregation. We believe such a request is reasonable.

Respondents, in petitioning this Court for a Writ of Certiorari to review the Sixth Circuit's decision on the merits in this case, also recognized that plaintiffs had prevailed on appeal:

> Petitioners appealed from the decision of the District Court and moved the Court for a stay of the District Court's order [Plan A] pending the outcome of the appeal. Respondents filed a cross appeal asking that additional pupil transportation be required. On June 2, 1972, the Sixth Circuit Court of Appeals granted petitioners' request for a stay. Following an expedited hearing of the appeal, the majority of the Court of Appeals on August 29, 1972, vacated the stay and directed the implementation of Plan A. The Court

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[1] The Fourth Circuit decision reversed by this Court in *Newman* had held that Title II of the 1964 Civil Rights Act merely "authorizes the court in its discretion to allow the prevailing party (other than the United States) a reasonable attorney's fee as part of costs." 377 F.2d 433, 437 (1967).

of Appeals also went beyond the order of the District Court in directing that Plan A should be regarded as only the first step in a more massive program of pupil transportation and instructed the District Court to prepare a timetable for additional desegregation.[2]

Respondents still concede that plaintiffs obtained all the relief they sought on appeal, but urge that plaintiffs did not obtain on appeal certain further relief which plaintiffs did not seek on appeal but had sought in the District Court. The prevailing party on appeal, however, is determined with reference to the relief sought on appeal, not remedies pressed at an earlier time but abandoned before the appeal. There is no reason to believe that the Sixth Circuit adopted or applied *sub silentio* the unprecedented and mistaken construction of Rule 39 now suggested by Respondents.

Finally, Respondents suggest that the Court of Appeals may have denied costs, including attorneys fees, because plaintiffs' petition for rehearing of November 3, 1972 was filed out of time. Brief in Opposition, pp. 3-4.[3] This contention is clearly refuted by the record in this case. Plaintiffs' initial application for costs was filed, not in November, 1972, but on September 7, 1972, in the form of a Bill of Costs. See Federal Rule of Appellate Procedure, Rule 39(c). That application was undeniably timely, and Respondents do not claim otherwise. This first application

[2] Petition for Writ of Certiorari, *Board of Education of the Memphis Schools* v. *Northcross*, No. 72-677, p.7, *cert. denied*, 41 U.S.L. Week 3345 (February 20, 1973).

[3] If the Court is concerned by any uncertainty as to the basis of the Sixth Circuit's decision, the proper disposition is not to deny the Writ, as Respondents suggest, but to vacate the judgment and remand the case to the Court of Appeals for an explanation of its order. *Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *California* v. *Krivda*, 409 U.S. 33 (1972).

for costs was denied by the Sixth Circuit at some unknown time between August 29, 1972 and October 25, 1972.[1] That denial was issued before plaintiffs' petition for rehearing of November 3, 1972, and cannot have been due to any tardiness of that petition. On November 24, 1972, the Court of Appeals again denied costs and fees, this time passing on plaintiff's second application of November 3. Whatever the basis of this second decision, plaintiffs seek review in this Court of both that denial of costs and fees and the earlier denial which occurred sometime in September or October. This earlier decision was clearly on the merits and cannot have turned on the timeliness of a subsequent petition for rehearing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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[1] Respondent concedes that this matter was not dealt with in the Sixth Circuit's opinion of August 29, 1972. Brief in Opposition, p.2.

IN THE

Supreme Court of the United States

October Term, 1972

Supreme Court, U. S.
FILED
MAY 31 1973
MICHAEL RODAK, JR., CLE

No. 72-1164

DEBORAH A. NORTHCROSS, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

Petitioners in the above-captioned cases file this joint supplemental brief pursuant to Rule 24(5) in support of their petitions for writs of certiorari presently pending before this Court. The brief deals with the applicability to these cases of this Court's decision of May 21, 1973, in *Hall* v. *Cole*, 41 U.S.L.W. 4658.

In *Hall* v. *Cole* this Court approved the award of legal fees to a union member who successfully sued for reinstatement in his union after he was expelled for criticizing union

officers. The Court held that the case was "clearly governed" by the rule stated in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), sanctioning the award of such fees to a plaintiff who had benefitted the members of a larger class. The benefits involved in *Hall* were non-pecuniary in nature; the plaintiff there had dispelled the chill cast upon the right of free speech of other union members, and the preservation of union democracy promised to affect the future conduct of union affairs. By awarding legal fees out of the union treasury the cost of the litigant's efforts were transferred to all the benefitted union members.

School desegregation cases such as these have an impact far beyond the named parties. The instant plaintiffs sued to protect all black school children in their respective school districts from segregation on the basis of race which would generate "a feeling of inferiority as to their status in the community that may affect their minds and hearts in a way unlikely to be undone." *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954). Nor are the benefits of this litigation limited to black children:

> All of our people, whites, Orientals, Negroes and Mexican-Americans, will benefit by integrated living and experience in integrated schools, learning that race, color, creed, economic and social circumstances or station in life do not make anyone more or less than a human being. Integrated education will tend to teach all of the students to lose their fears of different races, their prejudice, their bias, their bigotry, to seek and do Justice, to walk humbly with their fellow beings, to love mercy, to temper righteousness with mercy, and to allow to every person their right to worship as they will. The parents, in participating in integrated educational processes, will also so learn. Board will learn of the benefit to all of its students by and from inte-

grated education and will, hopefully, lose its assumptions of inferiority of one race when compared with another.

Crawford v. *Board of Education of the City of Los Angeles* (No. 822 854, Superior Court, Los Angeles County, opinion dated February 11, 1970).

Respondents in *Bradley* urge that this argument (i.e., that the litigation benefitted the class of school children involved), was not part of the case below. Brief in Opposition, p.12, n.20. On the contrary, the class benefit theory was urged by petitioners and considered by the lower courts at each stage of the proceedings below. In their memorandum in the District Court, petitioners argued they were entitled to legal fees because the litigation had benefitted the school children of Richmond.[1] The District Court expressly considered this class benefit theory, though it declined to apply it to school desegregation litigation. Petition, pp. 12a-14a. On appeal petitioners expressly criticized the Fourth Circuit's recent decision in *Brewer* v. *School Board of Norfolk, Virginia*, 456 F.2d 943 (4th Cir. 1972).[2]

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[1] "The right of counsel to reasonable compensation should not be restricted or inhibited by a doctrine which limits the compensation to causes which result in monetary recovery. The protection and preservation of the inalienable constitutional rights of citizens, the enforcement of the duties of government owed to its citizens by law, is at least as valuable (if not more so) than the recovery by litigation of money. . . . To the extent that a large proportion of the students of Richmond are afforded substantial benefits through this action, by causing the School Board to perform the duties specifically imposed upon it by law, it raises the standard of the fiduciary relationship of the Board to all of its students and so serves important considerations of public policy. . . . Cf. *Mills* v. *Electric Auto-Lite Company*." Memorandum in Support of Motion for Attorneys' Fees, p. 3.

[2] "[W]e submit that the pecuniary theory adduced in *Brewer* is too narrow, and we direct the Court's attention to the Supreme Court's language in *Mills* v. *Electric Auto-Lite Co.* . . ." Supplemental Brief for Appellees, p. 8.

The Fourth Circuit expressly relied on *Brewer* in its decision denying attorneys fees in *Bradley*. Petition, pp. 35a, 54a. Thus, the applicability of the class benefit theory to school desegregation cases was consistently raised in the lower courts.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted, and these cases set down for argument or summarily reversed under the authority of *Hall* v. *Cole*.

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NORTHCROSS ET AL. v. BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1164. Decided June 4, 1973

Since the Court of Appeals' denial of costs and attorneys' fees under § 718 of the Emergency School Aid Act of 1972 to petitioners, who were successful in litigation aimed at desegregating the public schools of Memphis, Tenn., was without stated reasons, this Court cannot determine whether the proper standard, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, was correctly applied. Certiorari granted; vacated and remanded.

PER CURIAM.

This case presents the question of the propriety, under § 718 of the Emergency School Aid Act of 1972, 86 Stat. 369, 20 U. S. C. § 1617, of a denial of attorneys' fees to the successful plaintiffs in this litigation aimed at desegregating the public schools of Memphis, Tennessee. Section 718, which became effective on July 1, 1972, provides that "[u]pon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof)," in any action seeking to redress illegal or unconstitutional discrimination with respect to "elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." In this case, the United States Court of Appeals for the Sixth Circuit denied petitioners' motion for an award of attorneys' fees. The Court of Appeals did not, however, state reasons for the denial and it is therefore not possible for this

Court to determine whether the Court of Appeals applied the proper standard in reaching this result.[1]

Section 718 tracks the wording of § 204 (b) of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–3(b), which provides that, in an action seeking to enforce Title II of that Act, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), we held that, under § 204 (b), "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.*, at 402. The similarity of language in § 718 and § 204 (b) is, of course, a strong indication that the two statutes should be interpreted *pari passu*. Moreover, "the two provisions share a common *raison d'être*. The plaintiffs in school cases are 'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose—'to encourage individuals injured by racial discrimination to seek judicial relief . . . .'" *Johnson* v. *Combs*, 471 F. 2d 84, 86 (CA5 1972), quoting *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, at 402. We therefore conclude that, as with § 204 (b), if other requirements of § 718 are satisfied, the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U. S., at 402. Since it is impossible for us

[1] Respondents suggest that petitioners' motion for costs and attorneys' fees might have been denied due to untimeliness. Although it is clear that the petitions for rehearing en banc were denied as untimely, there is no indication that the bill of costs was filed out of time, or that costs and attorneys' fees were denied for that reason.

to determine whether the Court of Appeals applied this standard and, if so, whether it did so correctly, we grant the petition for certiorari, vacate the judgment below insofar as it relates to the denial of attorneys' fees, and remand to the Court of Appeals for further proceedings consistent with this opinion.[2] *See Taylor* v. *McKeithen*, 407 U. S. 191 (1972); cf. *California* v. *Krivda*, 409 U. S. 33 (1972).

MR. JUSTICE MARSHALL did not participate in the consideration or decision of this case.

[2] We need not, and therefore do not, decide whether § 718 authorizes an award of attorneys' fees insofar as those expenses were incurred prior to the date that that section came into effect. We also do not decide whether, and under what circumstances, an award of attorneys' fees is permissible in suits brought under 42 U. S. C. § 1983 in the absence of specific statutory authorization for such an award. *See Knight* v. *Auciello*, 453 F. 2d 852 (CA1 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971).